Financial Services Flash

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Business Development Bank of Canada v. Pine Tree Resorts Inc. and 1212360 Ontario Limited: A Unified Test for Granting Leave to Appeal under Section 193(e) of the BIA

By Ian Aversa*

On April 2, 2013, Justice Mesbur of the Ontario Superior Court of Justice (Commercial List) granted an application brought by Business Development Bank of Canada ("**BDC**") for the appointment of a receiver over the assets, undertakings and properties of Pine Tree Resort Inc. and 1212360 Ontario Limited, operating as the Delawana Inn in Honey Harbour, Ontario (together, "**Delawana**").

Delawana and its second mortgagee, Romspen Investment Corporation ("**Romspen**"), sought to appeal Justice Mesbur's order. In his decision dated April 29, 2013,[1] Justice Blair of the Ontario Court of Appeal considered: (a) whether Delawana could appeal as of right under section 193 of the *Bankruptcy and Insolvency Act* (the "**BIA**"); and (b) if leave to appeal was required, whether it should be granted.

BDC held first-ranking security for the indebtedness owed to it by Delawana by way of a mortgage over Delawana's lands, as well as a general security agreement covering both Delawana's lands and chattels. Romspen was the second mortgagee. Both mortgages were in default. BDC applied for the appointment of a receiver to oversee the sale of Delawana's property. Delawana and Romspen opposed BDC's application, as they wanted to sell Delawana's property on a going-concern basis under their own power and control. Essentially, the dispute hinged on which secured creditor would have control over the sale of Delawana's property and which plan for sale would be implemented.

In seeking to appeal the order of Justice Mesbur, Delawana and Romspen's main argument in support of the appeal itself was a question of law concerning the rights of subsequent mortgagees under section 22 of the *Mortgages Act* (Ontario).

Specifically, Delawana and Romspen relied on sections 193(a), (c) and (e) of the BIA to argue that their appeal was as of right. Justice Blair rejected each of those arguments in turn. Citing *Century Services Inc. v. Brooklin Concrete Products Inc.*,[2] Justice Blair held that there is no automatic right to appeal from an order appointing a receiver.

First, Justice Blair held that "future rights" under section 193(a) of the BIA are future legal rights, and do not include rights that presently exist but that may be exercised in the future. Romspen did not have any future rights in this case.

Second, Justice Blair held that the property in the appeal did not exceed $10,000 in value for the purposes of section 193(c) of the BIA. An order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

Finally, Justice Blair examined the two articulations of the test to be applied for granting leave to appeal under section 193(e) of the BIA which have emerged from the jurisprudence.[3] To clarify the confusion regarding these tests, Justice Blair laid out a unified approach to granting leave to appeal under section 193(e) of the BIA:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal:
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> a. raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
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> b. is *prima facie* meritorious; and
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> c. would unduly hinder the progress of the bankruptcy/insolvency proceedings.

Justice Blair went on to explain that proposed appeals that are *prima facie* meritorious include those in which the judgment or order under attack: (i) appears to be contrary to law; (ii) amounts to an abuse of judicial power; or (iii) involves an obvious error causing prejudice for which there is no remedy. The test for leave to appeal is not simply merit-based. He also stated that decisions of the Commercial List in both BIA and *Companies' Creditors Arrangement Act* proceedings are entitled to considerable deference.

Applying his newly formulated test for granting leave to appeal under section 193(e) of the BIA to the facts of this case, Justice Blair concluded that Delawana and Romspen had not met the test for leave. Justice Blair did not concur with Delawana and Romspen's proposed interpretation of section 22 of the *Mortgages Act* (Ontario). Additionally, interfering with the timeliness of the sale process planned by BDC and the receiver could potentially impact the success of the sale of Delawana's property.

In conclusion, Justice Blair held that there was no appeal as of right from the receivership order granted by Justice Mesbur under section 193 of the BIA. Leave to appeal was required, but Delawana and Romspen did not meet the test for leave to be granted in this case. The proceedings of Delawana and Romspen were therefore dismissed.

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1. 2013 ONCA 282.
2. (11 March 2005), Court File No. M32275 (Ont. C.A., in Chambers), Catzman J.A.
3. See *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) and *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A., in Chambers).

Correction:

In our recent newsletter dated May 2013, we concluded that when it comes to competing security interests between two banks under the *Bank Act*, the first bank to properly register its security will have priority. To clarify, such a security interest is enforceable from the time the security documents are executed, provided that a notice of intention is registered beforehand. Accordingly, priority will be given to the first bank to properly take security under the *Bank Act*.